Supreme Court
FILED
JAN 16 2003
OFFICE

(5)

No. 01-1757

IN THE
Supreme Court of the United States

MARION R. STOGNER,
Petitioner,

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

Martin N. Buchanan
Michael B. Dashjian
1527 W. Lewis Street
San Diego, CA 92103
(619) 294-7891

Counsel for California Attorneys for Criminal Justice

David M. Porter
Counsel of Record
Jeffrey L. Fisher
Barry T. Simons
Eric B. Martin
National Association of Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

January 16, 2003

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that newly enacted criminal laws are not unfairly applied to past conduct. To those ends, NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including several ex post facto cases. *See, e.g., Carmell v. Texas,* 529 U.S. 513 (2000).

The California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation founded in 1972. It has 2,400 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its by-laws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ has appeared in this Court as *amicus curiae* on numerous occasions. CACJ has also participated in litigating the constitutional issues in this case by filing an amicus brief in *People v. Frazer*, 21 Cal. 4th 737 (1999). CACJ also has special expertise in aspects of California criminal law that may assist the Court in its resolution of this case.

Because a law that revives an expired limitations period on a crime contravenes the fundamental notions of justice embodied in the Ex Post Facto Clause, NACDL and

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, and no person or entity, other than *Amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

CACJ respectfully submit this brief *amici curiae* in support of Petitioner.

SUMMARY OF ARGUMENT

California Penal Code 803(g) violates the Ex Post Facto Clause at least as applied to any charged offense that allegedly was committed before January 1, 1991.

I. The first and fourth categories of the ex post facto prohibitions enunciated in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), bar States from amending their criminal law to retroactively eliminate an essential ingredient for conviction or otherwise to allow different evidence to convict an offender than was required when the act was committed. Section 803(g) of the California Penal Code violates these prohibitions. At the time that Petitioner allegedly committed the charged offenses, California law required the State, in order to secure a conviction, to allege and prove that the offenses occurred within three years of the filing of the indictment. Section 803(g) relieves the State of its obligation to prove this fact and substitutes a very different requirement that is much easier to satisfy: demonstrating that the indictment was filed within one year of a victim's allegation, regardless of how many years have passed. Because the only way for the State to convict Petitioner is to invoke this new law, the Ex Post Facto Clause prohibits it from retroactively applying it here.

It is immaterial for constitutional purposes whether §803(g)'s elimination of the original limitations period alters the nature of the prohibited conduct at issue here. The history of *Calder*'s first category demonstrates that the Ex Post Facto Clause applies to *all* retroactive laws that allow States to convict an individual who was otherwise legally beyond their reach. And even if it could fairly be said that §803(g) merely replaces the expired limitations period with

another one that the State may now satisfy, the statute still permits a conviction on "different" evidence "than the law required at the time of the commission of the offense," in violation of *Calder*'s fourth category. 3 U.S. at 390.

II. Prohibiting States from prosecuting individuals after original limitations periods have expired comports with the purposes of the Ex Post Facto Clause. It safeguards fundamental fairness by requiring the government to abide by the rules it established to govern the circumstances under which it could deprive people of their liberty. It also protects the presumption of innocence by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *United States v. Marion*, 404 U.S. 307, 322 n.14 (internal quotation and citation omitted). Finally, forbidding prosecutions of previously time-barred criminal cases restrains potentially vindictive legislation by preventing States from singling out unpopular groups in order to make it easier to punish them for past conduct.

The California Supreme Court in *People v. Frazer*, 21 Cal. 4th 737 (1999), ignored these red flags because of its view that the Ex Post Facto Clause is limited to ensuring that people can assess in advance whether a particular course of conduct is criminal in nature. But this Court has squarely rejected this notion. All nine Justices in *Carmell v. Texas*, 529 U.S. 513 (2000), agreed that retroactive laws need not alter the characterization of criminality in order to implicate the Ex Post Facto Clause. And in the civil context, this Court recently held that applying a law retroactively to create jurisdiction when it otherwise would not have existed is as impermissible as "reviv[ing] a moribund cause of action." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997). Constitutional concerns regarding the

unfairness of retroactive legislation pertain whenever a new cause of action is created.

III. The history and function of limitations periods also support refusing to the State to apply §803(g) retroactively. Criminal statutes of limitations always have been understood to provide repose – that is, a conclusive bar to prosecution – when they expire. But if this Court were to hold here for the first time that a State may prosecute an individual after the original limitations periods have expired, then statutes of limitations will become essentially revocable at will. This would damage the public's faith in the stability of the law and open the door to political abuses of power. What is more, if States could revive expired statutes of limitations, then they seemingly could retract other types of legislative grants of immunity and amnesty. All of this uncertainly would undermine, if not abrogate, the well-established rule that the Fifth Amendment privilege against self-incrimination does not apply after a limitations period has run or a defendant otherwise has obtained immunity. This Court should resist issuing a ruling that would cast these settled principles into disarray.

ARGUMENT

Because we believe that this case can be fully resolved on ex post facto grounds, and for considerations of space, *Amici* will confine ourselves to that issue.[2]

I. Section 803(g) Attaches Criminal Liability to Conduct Previously Beyond the State's Reach, in Violation of *Calder*'s First and Fourth Ex Post Facto Categories.

A. The Ex Post Facto Clause Prohibits Laws That Retroactively Eliminate or Change Facts Necessary to Convict Defendants.

The Ex Post Facto Clause, in perhaps its most vital application, prohibits laws that eliminate or relax an ingredient of the State's burden of proof – thereby bringing past conduct that was otherwise beyond the government's reach within its power to prosecute and punish. In his definitive exposition of the Ex Post Facto Clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Chase explained that the Clause forbids "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action" and "4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Id.* at 390 (emphasis in original). This Court reaffirmed these prohibitions in *Carmell v. Texas*, 529 U.S. 513 (2000), describing these *Calder* categories as precluding laws "retrospectively eliminating an element of the offense,"

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[2] Many of the arguments that follow, of course, also pertain to the due process question presented, for both the Ex Post Facto and Due Process Clauses are designed to guarantee fundamental justice and basic fairness.

Carmell, 529 U.S. at 532, or allowing "different . . . evidence" to convict a defendant "than was required, when the act was committed." *Id.* at 524 (quotation omitted). Retroactive laws falling into these first and fourth categories are close cousins, for in each instance the change in law permits the government to convict defendants who otherwise would have been entitled to acquittals as a matter of law. In each instance, the vice of retroactively applying the new law is that it relieves the government of its prior obligation to prove a fact it concedes that it cannot now establish.

Laws retroactively eliminating or altering the facts necessary to establish guilt are different, and more objectionable, than the Texas law this Court disallowed in *Carmell*. The law in *Carmell* did not alter the essential facts necessary for conviction, but rather merely allowed them to be satisfied with *less* evidence. Section 803(g) fundamentally changes the facts that the State must prove to convict people of lewd conduct offenses, in a manner that allows conviction on *different* evidence than was required when the act was allegedly committed. Although *Calder*'s fourth category forbids retroactive changes allowing conviction on both "less, or different" evidence, *see* 3 U.S. at 390, only the latter type of change completely relieves the government of a prior duty to prove a certain fact regarding the charged offense.

Laws eliminating or altering facts that the government formerly had to prove also are qualitatively different than those that are simply "procedural," that is, that merely adjust "the procedures by which a criminal case is adjudicated." *Collins v. Youngblood*, 497 U.S. 37, 45 (1990); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (noting Ex Post Facto Clause's distinction between procedural and substantive rules); *Hopt v. Utah*, 110 U.S. 574 (1884) (upholding retroactive application of witness competency statute because it affected only trial procedure). Only the former affect "the substantive law of crimes,"

Collins, 397 U.S. at 45, or as this Court earlier put it, "the legal definition of the offense." *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). Accordingly, as this Court explained over 100 years ago, the Ex Post Facto Clause prohibits States retroactively from "chang[ing] the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt*, 110 U.S. at 590.

B. Limitations Periods Are Facts Necessary for a Conviction Under California Law.

For all persons like Petitioner who are charged with committing lewd conduct before 1991, § 803(g) retrospectively eliminates one of "the ultimate facts" that formerly was "necessary to establish guilt." *Hopt*, 110 U.S. at 590.[3] The unwavering rule in California is that "[a]n accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations." *In re Demillo*, 14 Cal. 3d 598, 601 (1975); *accord People v. Zamora*, 18 Cal. 3d 538, 565 n.26 (1976); *People v. Crosby*, 58 Cal. 2d 713, 724-25 (1962). An indictment that reveals on its face that prosecution is barred by the statute of limitations "fails to state a public offense," *People v. Rehman*, 62 Cal. 2d 135, 139 (1964), and "no judgment of conviction could be based upon it." *People v. Hoffman*, 132 Cal. App. 60, 62 (1933); *accord People v. McGee*, 1 Cal. 2d 611, 613 (1934).

After the indictment is filed, "[t]he burden of proof is on the [State] to show that the offense was committed within the time period provided within [the limitations period]

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[3] Applying § 803(g) to persons accused of committing offenses between 1991 and 1993 may also violate the Ex Post Facto Clause by *extending* the statute of limitations beyond the period prescribed at the time of the charged offenses. But this Court need not address that issue here, for this case, like all pre-1991 charged offenses, concerns only the revival of previously *expired* causes of action.

provided in section 800." *Demillo,* 14 Cal. 3d at 601; *accord Crosby,* 58 Cal. 2d at 725. The California Supreme Court has further explained that:

> Failure to sustain that burden will result in vacation or reversal of the judgment of conviction. . . . It follows that if the evidence upon which the indictment is based is to 'warrant a conviction by a trial jury' (Pen. Code, § 939.8), it must include at least some evidence that the prosecution is not barred by the statute of limitations.

Crosby, 58 Cal. 2d at 725; *see also Zamora*, 18 Cal. 3d at 565 nn.26 & 27 (to hold defendant pending trial, "the [State] bear[s] the burden of producing evidence . . . which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations"; State also bears ultimate burden at trial). In cases in which there are disputed issues of fact regarding whether the indicted acts occurred within the limitations period, "the limitation issue . . . is a question for the trier of fact," *Zamora*, 18 Cal. 3d at 563, and the court must "instruct [the jury on the] element of the statute of limitations, just as it" must "instruct on an element of the crime itself." *People v. Bell*, 45 Cal. App. 4th 1030, 1065-66 (1996); *see also Zamora*, 18 Cal. 3d at 565 n.27 (noting trial courts should "carefully instruct the jury" on the prosecution's burden of proof as to the statute of limitations); California Jury Instructions Criminal 224 (6th ed. 1996) (standard California jury instruction on statute of limitations).

Finally, proof that the charged offense occurred within the limitations period is, in California, legally essential to the punishment to be inflicted. As the California Court of Appeal put it, "[t]his state has determined that before [criminal defendants] could be convicted of the charged

offenses, a jury must determine that the prosecution came within the limitation period. . . . [A] failure to prove that an offense comes within the limitation period results in a verdict of not guilty." *Bell*, 45 Cal. App. 4th at 1065. If the jury finds, in other words, that the prosecution has failed to carry its burden of proof on the statute of limitations issue, it must acquit the defendant of the charged crime.

Indeed, California has determined that proof that the alleged offense occurred within the limitations period is so important that, unlike most other ingredients of crimes, a defendant may raise the issue for the first time on appeal, *People v. Chadd*, 28 Cal. 3d 739, 757 (1981), or on collateral attack in a state petition for writ of habeas corpus. *Demillo*, 14 Cal. 3d at 602 (granting state habeas relief); *see also McGee*, 1 Cal. 2d at 613 (issue may be raised at any time). Even defendants who plead guilty may prevail on this issue on appeal. *See Zamora*, 18 Cal. 3d at 547. In this sense, California deems compliance with the statute of limitations to be a jurisdictional fact that must be pled and proven by the prosecution in every criminal case. *See People v. Williams*, 21 Cal. 4th 335, 337 (1999) (collecting cases terming issue "jurisdictional"); *Demillo*, 14 Cal. 3d at 601-02; *Crosby*, 58 Cal. 2d at 724-25; 2 Witkin & Epstein, California Criminal Law 581 (3d ed. 2000) ("Because the statute of limitations is jurisdictional and need not be specifically pleaded as a defense, the defendant's plea of not guilty raises the issue.").

Simply put, it has been "well-established" in California, both before and since the enactment of § 803(g), "that the statute of limitations is a substantive matter which the prosecution must prove" just like "any other 'element' of its case." *People v. Le,* 82 Cal. App. 4th 1352, 1360 (2000); *see also People v. Gordon,* 165 Cal. App. 3d 839, 852 (1985) (proof that charged acts occurred within limitations period is "an essential element of the offense"); *People v. Doctor,* 257

Cal. App. 2d 105, 110 (1967); *People v. Allen*, 47 Cal. App. 2d 735, 748 (1941) (same). If the prosecution is unable to show that the charged offense occurred inside of the limitations period, the State cannot punish the defendant.[4]

C. The Prohibition Against Eliminating Facts Necessary for a Conviction Is Not Limited to Facts Defining the Nature of the Prohibited Conduct at Issue.

Because Section 803(g) retroactively alters an element of Petitioner's alleged offenses in order to allow the State to convict him, it is a classic ex post facto law. In 1973 – the most recent time that Petitioner is alleged to have violated the law – California law required the State in any prosecution for lewd conduct to prove to a jury that the defendant violated the law three years or less prior to his indictment. Cal. Penal Code § 800 (1972), replaced by § 800 (1984) (three-year period). That limitations period expired in 1976, and when the State enacted § 803(g) in 1994, there is no dispute that Petitioner's alleged transgressions were beyond the reach of the criminal law. Section 803(g), however, retroactively

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[4] California, of course, is not alone in treating limitations periods as ingredients of the prosecution's burden of proof. Federal law does the same thing. *See Grunewald v. United States*, 353 U.S. 391, 396 (1957) (it is "incumbent on the Government to prove" that prosecution was instituted within applicable statute of limitations); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) (same); *United States v. Frank*, 156 F.3d 332 (2d Cir. 1998) (jury must be instructed on statute of limitations). Indeed, such has been the rule from the early days of criminal law in the United States. *See, e.g., United States v. Smith*, 27 F. Cas. 1158 (C.C. Conn. 1809) (No. 16,332) (government must prove statute of limitations); *United States v. White*, 28 F. Cas. 570 (C.C.D.C. 1837) (No. 16,678) (government must plead and prove statute of limitations); *United States v. Johnson*, 26 F. Cas. 621 (C.C. Ohio 1879) (No. 15,483) (same).

erases the State's prior duty to prove that the charged offenses occurred less than three years ago and makes it possible for the State to obtain a conviction that otherwise was impossible. This limitations revival statute impermissibly relaxes the State's burden of proof.

The California Supreme Court's ruling that applying § 803(g) retroactively does not violate Calder's first category because, strictly speaking, it "makes no change in the *act or intent* elements which the prosecution must prove," *People v. Frazer*, 21 Cal. 4th 737, 760 (1999) (emphasis added) misapprehends the nature of the *Calder* categories. Justice Chase stated in *Calder* that the Ex Post Facto Clause prohibits retroactive laws falling into his four categories "and similar laws." 3 U.S. at 391. Accordingly, the four *Calder* categories are to be read as illustrative types of laws that violate the constitutional prohibition against retroactive criminal legislation, not as rigid, limited classifications that may be divided and conquered. *See id.* at 171; *Weems v. United States*, 217 U.S. 349, 373-74 (1910) (rejecting a "narrow and restrictive construction" of the *Calder* categories in favor of a "more extensive application"). "If the inhibition" against ex post facto laws "could be evaded by the form of the enactment, its insertion into the fundamental law was a vain and futile proceeding." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

Properly understood, *Calder*'s first category prevents the government from retroactively erasing any fact that has an effect tantamount to eliminating an element of an offense – that is, *any* fact that determines whether the defendant can be convicted of the charged offense, regardless of whether the fact goes directly to the nature of the prohibited conduct. In *Calder* itself, Justice Chase noted that retroactive laws that "inflicted punishments, where the party was not, by law, liable to any punishment" before the law was passed violated the Ex Post Facto Clause. 3 U.S. at 389.

He further explained, on the other hand, that applying a law retroactively "to save time from the statute of limitations" – that is, to shorten the limitations period that existed at the time the alleged offense was committed – would be acceptable because it would "mollif[y] the rigor of the criminal law." *Id.* at 391. The inescapable implication of these statements is that a law that revived an expired statute of limitations would violate the Ex Post Facto Clause, for it would enlarge the scope of the criminal law by bringing within its reach an act that otherwise "was not, by law, liable to any punishment." *Id.* at 389.

Justice Chase's opinion in *Calder* also "embraced" "the authoritative exposition" of the ex post facto guarantee found in the common law treatise of Richard Wooddeson. *Carmell,* 529 U.S. at 522-24. In describing what became *Calder*'s first category, Wooddeson illustrated the scope of the prohibition against retroactive changes that "respect the crime":

> It has been usual, in times of domestic rebellion, to pass acts of parliament inflicting the pains of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. . . . No alteration is made in the rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited, be contested, these questions are to be decided by the same testimony as would be admissible in other trials. Neither is there any varied modification of punishment. *But a material innovation is made respecting the crime.* For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed. Until

> that time it is unchoate, and unripe for the operation of the particular statute.

2 Richard Wooddeson, A Systematical View of the Laws of England 625-26 (1792) (Lecture 41) (emphasis added).[5]

Although the State asserts that retroactive changes in limitations periods are immune from ex post facto scrutiny on the ground that they "merely address[] when the state may prosecute certain criminal charges," Brief in Opp. at 11, Wooddeson's classification of a change in the timeline for litigating an individual's guilt as "material innovation . . . respecting the crime," Wooddeson, *supra,* at 626, demonstrates that such prohibited retrospective innovations include more than simply changes in the substantive conduct defining the nature of the offense. The surrender deadline that Wooddeson described did not alter the nature of the prohibited act of treason. But applying this new law retroactively nevertheless created, in his view, a new crime. And given that a new law redefining the time period in which a defendant has a right to prove his innocence triggers ex post facto protections, so does a new law that redefines the time period in which the government has a right to prove his guilt. The laws are mirror images of each other; they both set a deadline by which one party must act before forever losing the right to litigate a criminal case. And both types of laws are designed to permit the conviction of persons who have become beyond the government's criminal jurisdiction.

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[5] That the laws that Wooddeson was describing were also bills of attainder does not detract from their relevance as examples of ex post facto laws. *See Carmell,* 529 U.S. at 536 (Wooddeson thought that all laws he described in Lecture 41 were ex post facto laws). Indeed, "*all* of the specific examples listed by Justice Chase" and Wooddeson "were passed as bills of attainder." *Id.* at 537.

The State's final protestation that § 803(g) "actually *increases* the procedural burdens on the government" because now the State "must produce 'independent evidence that clearly and convincingly corroborates the victim's allegation,'" Brief in Opp. at 11 (quoting § 803(g)(2)(B)), does not alter this analysis. As an initial matter, § 803(g) does not "increase" the State's burden of proof. Before that law was enacted, there was only one way for the State to satisfy the limitations-period element in this case: show that the crime occurred less than three years prior to the indictment. The State cannot meet that duty in this prosecution. But § 803(g) creates a second, or alternate, way of satisfying that prior obligation. That statute, therefore, plainly *reduces* the State's burden of proof by giving it an alternative way of securing a conviction.

Even if § 803(g)(2)(B)'s new "independent evidence" requirement – along with the State's new obligation to show that the indictment was filed within one year of the victim's report to law enforcement, *see* § 803(g)(1) – could be said to *replace*, instead of reduce, the old within-three-years-of-offense requirement, § 803(g) still permits a conviction on "different" evidence "than the law required at the commission of the offence," in violation of *Calder*'s fourth category. *Calder,* 3 U.S. at 390; *accord Carmell,* 529 U.S. at 524 (fourth category prohibits laws "whereby different . . . evidence, is required to convict an offender, than was required, when the act was committed") (quoting Joseph Story, 3 Commentaries on the Constitution of the United States § 1339, at 212 (1833)). The mere fact that a law replaces an element that it retroactively eliminates with a new element that the State can now prove does not save it from the ex post facto infirmity.

The decisive question for ex post facto purposes is whether the retroactive law at issue changes the substance of what the government must prove in order to convict the

defendant. *See, e.g., Hopt,* 110 U.S. at 590. Analyzed through this lens, there can be no dispute that § 803(g) changes the facts necessary for conviction under California law and, hence, violates the Ex Post Facto Clause.

II. Prohibiting Revivals of Stale Criminal Cases Comports With the Purposes of the Ex Post Facto Clause.

Not only does § 803(g) contravene the ex post facto prohibitions spelled out from *Calder* to *Carmell*, but this limitations revival statute also treads on the core concerns of the Ex Post Facto Clause. This Court explained in *Carmell* that the Clause protects the "fundamental fairness" of the justice system, "even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell*, 529 U.S. at 532-33. "In each instance [in which the Clause is violated], the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." *Id.*

A state law that allows the government to bring an otherwise stale criminal prosecution flouts this precise interest in fundamental fairness. Such laws can help only the government. There is no way, once the original limitations period has expired, that relieving a State of its prior duty to prove that the charged offense occurred within that period can possibly give an advantage to a defendant. Accordingly, as Judge Learned Hand explained long ago, allowing a State "to revive a prosecution already dead" violates "our instinctive feelings of justice and fair play." *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928). "For the state to assure a man that he has become safe from pursuit," he continued, "and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." *Id.* at 426.

Section 803(g), like other ex post facto laws, also "subvert[s] the presumptions of innocence." *Carmell,* 529 U.S. at 540 (quoting *Cummings,* 71 U.S. at 328). "Passage of time . . . may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself." *United States v. Marion,* 404 U.S. 307, 321 (1971). This Court, therefore, has long observed that limitations periods protect the presumption of innocence by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 322 n.14 (quoting *Order of R.R. Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49 (1944)); *see also United States v. Kubrick,* 444 U.S. 111, 117 (1979) (limitations periods "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."). "[T]he applicable statute of limitations," in fact, is "the primary guarantee against bringing overly stale criminal charges. . . . These statutes provide predictability by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced." *Marion,* 404 U.S. at 322.[6]

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[6] The California Supreme Court has explained that limitations periods in that State are based on these same principles. *See Addison v. State*, 21 Cal. 3d 313, 317 (1978) ("The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend."); *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362 (1977) (adopting this Court's description of limitations periods in *Order of R.R. Telegraphers*); *California Sav. & Loan Soc'y v. Culver,* 127 Cal. 107, 110 (1899) ("Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time . . . when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult.").

It does not soften § 803(g)'s blow against the presumption of innocence that the State is required to produce clear and convincing evidence corroborating the victim's allegation in order to bring an otherwise time-barred prosecution. Limitations periods are not designed to push the prosecution to solidify its cases. To the contrary, they are designed for "the protection of those who may (during the limitation) . . . have lost the *means of their defence.*" *Id.* at 322 (internal quotation omitted) (emphasis added); *see also Toussie v. United States,* 397 U.S. 112, 114-15 (1979) (limitations periods are "designed to protect *individuals* from having to defend themselves against charges when basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past") (emphasis added); *Burnett v. New York Central R.R. Co.,* 380 U.S. 424, 428 (1965) (limitations periods "are primarily designed to assure fairness to *defendants*") (emphasis added).

Many individuals, in fact, trusting that statutes of limitations are binding on their governments, may over time discard items that would prove their innocence of potential charges against them. Permitting States to revive their own expired statutes of limitations would turn what these citizens have always assumed to be guarantees of immunity into traps for the unwary. In this sense, § 803(g)'s independent-evidence prerequisite actually compounds the unfairness of the State's limitations revival statute, for it means that stale prosecutions will be brought when only the *defendant* is likely to face evidentiary disadvantages due to the extreme passage of time.

Finally, there is an aspect of vindictiveness in § 803(g). The Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). That is to say, the Clause, along with the prohibition against bills of attainder, prevents States from singling out a particular type of crime and changing the rules to allow them to lasso certain individuals who they feel have escaped punishment (or not gotten enough punishment) under the old rules. In *Cummings*, for instance, this Court held that a law punishing individuals who refused to pledge their past loyalty to the United States, violated the Ex Post Fact Clause in part because it was "aimed at past acts," namely aiding the Confederacy in the Civil War. 71 U.S. at 327.

Section 803(g) implicates this same concern over vindictiveness. Child molestation is a horrible crime, and many in our current society, quite understandably, focus a particular outrage at those who appear to have "gotten away with it." Furthermore, unlike even the sexual molestation law at issue in *Carmell*, § 803(g) explicitly covers crimes that occurred "arising before" its effective date, and its very text reveals that the Legislature was keenly aware of its ex post facto implications. § 803(g)(3)(A) & (3)(A)(iii)-(iv). This suggests that the California Legislature, like many in society at large, may have borne some special resentment against persons accused of sexual offenses.

In spite of these red flags, the California Supreme Court stated in *Frazer* that § 803(g) does not trigger ex post facto protections because limitations periods are an "optional form of 'legislative grace'" and because "[t]he primary purpose of th[at] constitutional guarantee is to ensure that the consequences of a particular *course of conduct* can be meaningfully assessed in advance, without fear that the rules of criminality and punishment will later change." 21 Cal. 4th at 758, 760; *see also* Brief in Opp. at 5 (arguing that § 803(g)

does not "make[] innocent conduct criminal"). But both of these statements contravene this Court's precedent. This Court already has held squarely that "even if a statute merely alters penal provisions *accorded by the grace of the legislature*, it violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S. at 30-31 (emphasis added). The critical issue in assessing ex post facto challenges is not whether the defendant has a "right" to the prior, more lenient law; it is whether the subsequent, more severe law existed at the time when the crime was consummated. *Id.*

In addition, this Court's decisions make it clear that the Ex Post Facto Clause is intended to do more than ensure that individuals can assess whether "a particular course of conduct" is prohibited by law. *Frazer,* 21 Cal. 4th at 760. In reaffirming the vitality of *Calder*'s fourth category in *Carmell*, this Court expressly rejected the idea that a retroactive law must redefine the nature of prohibited conduct in order to violate the Ex Post Facto Clause. Using the infamous case of Sir John Fenwick as an example, this Court explained that:

> Fenwick could claim no credible reliance interest in the two-witness statute [that was in effect at the time of his actions], as he could not possibly have known that only two of his fellow conspirators would be able to testify to his guilt, nor that he would be successful in bribing one of them to leave the country. Nevertheless, Parliament had enacted the two-witness law, and there was a profound unfairness in Parliament's retrospectively altering the very rules it had established – *notwithstanding the fact that Fenwick could not truly claim to be "innocent."* . . . The Framers,

> quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly.

529 U.S. at 533-34 (emphasis added).

Although the *Carmell* dissenters disagreed as to whether *Calder*'s fourth category applies to laws that reduce the quantum of evidence necessary for convictions, they agreed that a law need not alter the characterization of criminality to implicate the Ex Post Facto Clause. Like the Fenwick case, the dissent's example of a category four violation – "[l]aws that reduce the burden of persuasion the prosecution must satisfy to win a conviction," such as a statute allowing the government to prove "leadership role in the offense" by a preponderance instead of beyond a reasonable doubt, *id.* at 572 (Ginsburg, J., dissenting) – does not in any way change the nature of the prohibited conduct at issue. The same was true of the Reconstruction-era law that this Court invalidated on ex post facto grounds in *Cummings v. Missouri,* which required certain individuals to establish their innocence of aiding or countenancing the Rebellion during the Civil War by making an "expurgatory oath," but which "did not, in terms, define any crimes." 71 U.S. at 326-28.

To the extent that any doubt remains regarding whether revivals of stale limitations periods trigger the evils of retroactivity that the Ex Post Facto Clause is designed to prevent, this Court's opinion in *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997), closes the issue. There, this Court held that a law expanding the circumstances under which individuals could bring *qui tam* suits could not be applied retroactively because it "change[d] the substance of the existing cause of action for *qui tam* defendants." *Id.* at 948. In response to the plaintiff's argument that the new law could apply retrospectively

because it was merely jurisdictional, the unanimous Court invoked the presumption against retroactivity – which is derived in substantial measure from the Ex Post Facto Clause, *see id.* at 948 (citing *Collins* and *Beazell*); *Landgraf,* 511 U.S. at 266 & 275 n.28; *Kaiser Aluminum & Chem. Corp. v. Bonjourno,* 494 U.S. 827, 856 (1990) (Scalia, J., concurring) – and held that the law could not so apply because rather than "affect[ing] only *where* a suit may be brought," it determined "*whether* it may be brought at all." *Hughes Aircraft,* 520 U.S. at 951. In other words, a law that created jurisdiction when it otherwise would not have existed anywhere could not be applied retroactively because the new law effectively created a new cause of action.

In language directly relevant to the case at hand, this Court further explained:

> Prior to the 1986 amendment, [plaintiff's] *qui tam* action was completely barred because of Hughes' disclosure to the Government of information about its claim submissions. The 1986 amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation, *much like extending a statute of limitations after the pre-existing period has expired impermissibly revives a moribund cause of action, see, e.g., Chenault v. U.S. Postal Service,* 37 F.3d 535, 537, 539 (9th Cir. 1994) (relying on *Landgraf* in concluding that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party . . . .").

Hughes Aircraft, 527 U.S. at 950 (emphasis added); *see also Le,* 82 Cal. App. 4th at 1360 ("the statute of limitations is a substantive matter" in California).[7] If ex post facto considerations do not allow statutes to revive a "moribund cause of action" in the civil context, then they must foreclose such laws in the criminal context.

III. Prohibiting Revivals of Stale Criminal Cases Is Necessary to Sustain the Historical Understanding of Statutes of Limitations and the Web of Jurisprudence That Depends on That Understanding.

The history and function of limitations periods also support refusing to apply § 803(g) retroactively. Indeed, such a ruling is necessary to avoid upsetting centuries of precedent that depends on the notion that people are immune from prosecution once a statute of limitations has expired.

A. The History and Function of Statutes of Limitations.

"Statutes of limitation . . . are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and their antecedents can be traced back for centuries. "Statutes of limitation relating to real property may be traced to ancient Greece or beyond." Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 455 (1997) (citing William D. Ferguson, The Statute of Limitations Savings Statutes 7 (1978)). "Emperors Honorious and Theodosius . . . moved by obvious considerations of

[7] All other courts of appeals to reach the issue have agreed with the Ninth Circuit's holding in *Chenault. See, e.g., Stone v. Hamilton,* 308 F.3d 751, 757 (7th Cir. 2002); *Million v. Frank,* 47 F.3d 385, 390 (10th Cir. 1995); *Rowe v. Sullivan,* 967 F.2d 186, 194 (5th Cir. 1992).

convenience, enacted in 424 A.D. that all actions should be barred within a certain period." Rudolf Sohm, The Institutes History and System of Roman Private Law 283 (Ledlie trans., 3d ed. 1970). England enacted its first limitations period, concerning property actions, in 1487. *See* Ochoa & Winstrich, *supra,* at 455. "[T]he English statute of limitations of the 21st of James I, . . . was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country." *Wood*, 101 U.S. at 139. Today, statutes of limitations are ubiquitous in criminal as well as civil law.

During all this time, it has been universally understood, at least in the criminal context, that lapsed limitations periods afford "repose" because "delay, extending to the limit prescribed, is itself a conclusive bar" to prosecution. *Wood,* 101 U.S. at 139; *see also Kubrick,* 444 U.S. at 117 (limitations periods are "statutes of repose"); *Marion,* 404 U.S. at 322 n.14 (criminal limitations periods "are to be liberally interpreted in favor of repose."); *United States v. Scharton,* 285 U.S. 518, 522 (1932) (same). A well known nineteenth century treatise, for example, described criminal statutes of limitations as granting permanent amnesty from the possibility of prosecution:

> Here, the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offence to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offence; that the offender shall be at liberty to return to his country and resume his immunities as a citizen, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. . . . [T]he

> very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.

Francis Wharton, A Treatise on the Criminal Law of the United States § 744 (7th ed. 1874), *quoted in Lamkin v. People*, 94 Ill. 501, 504-05 (1880); *see also Marion*, 404 U.S. at 322 n.14 ("The theory is that . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (internal quotation and citation omitted). Courts, therefore (until this case), consistently have rejected the few legislative attempts to permit the prosecution of stale offenses. *See State v. Cookman*, 920 P.2d 1086 (Or. 1996) (invalidating state law reviving expired limitations period); *Commonwealth v. Rocheleau*, 533 N.E.2d 1333 (Mass. 1989) (same); *Commonwealth v. Guimento*, 491 A.2d 166 (Penn. 1985) (same); *People v. Shedd*, 702 P.2d 267 (Colo. 1985) (same); *Moore v. State*, 43 N.J.L. 203 (N.J. 1881) (same).

Even California repeatedly has avowed that its statutes of limitations are meant to "promote repose, by giving security and stability to human affairs." *Shain v. Sresovich*, 104 Cal. 402, 406 (1894) (quoting *Wood*, 101 U.S. at 139); *see also Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 935 (1994) ("the primary interest served by statutes of limitations is that of repose"); *Zamora*, 18 Cal. 3d at 574 (limitations periods should be strictly construed in favor of repose); *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 228-29 (1944) ("The statute of limitations is a statute of repose. . . ."). Its courts, prior to the enactment of § 803(g), went so far as to echo *Wood*'s statement that an expired limitations period "is itself a conclusive bar" to bringing a case, *Shain*, 104 Cal. at 406 (quoting *Wood*, 101 U.S. at 139), and that it "grants prospective defendants relief from the

burden of indefinite exposure to stale claims." *David A. v. Superior Court (Jane D.)*, 20 Cal. App. 4th 281, 285 (1993).

But if this Court were to hold here that States may prosecute individuals for offenses whose original limitations periods have expired, then thousands of statutes of limitations across this country will no longer provide repose. They will become revocable at will. Legislatures, at any time, could identify any particular crime and declare that anyone could be prosecuted for it, no matter when the offense was allegedly committed. The potential for politically motivated abuses of this potential power against unpopular groups is patent.

The resulting damage to the public's ability to gain assurance from the criminal law would be profound. "Time limitations on criminal prosecutions are often supported as fostering a more stable and forward-looking society" in part because people do not always know whether they broke the criminal law in the past. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 230 (1982). Although understanding whether one has committed offenses such as child molestation or robbery is usually (but not always) fairly clear cut, people often are quite uncertain as to whether they have committed other crimes. Given the morass of environmental and tax laws, for instance, many businesspeople depend on limitations periods for peace of mind regarding past conduct and in planning for the future. And even for those who know that they have broken the law, such as those who in the distant past experimented with illegal drugs, "[t]he reason of [limitations periods] suggests that with a lapse of time men often give up evil-doing and become more law abiding citizens." *Wolfson v. United States*, 102 F. 134, 135 (5th Cir. 1900) (Boarman, J., dissenting); *see also Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (after extreme passage of time, "even wrongdoers are entitled to assume that their sins will be forgotten").

Removing the guarantee of repose would cause such individuals needless anxiety.

B. Other Areas of Law That Depend on the Irretrievability of Limitations Periods.

A ruling allowing revivals of expired statutes of limitations also would conflict with settled law in other areas. For starters, upholding § 803(g) would seemingly permit the permit retroactive abrogation of other statutory defenses that accrue after the alleged criminal conduct has occurred and that have always been thought to be irrevocable, such as legislative grants of amnesty or immunity in exchange for testimony or other favors to the government. *See, e.g., Brown v. Walker,* 161 U.S. 591, 601-02 (1896) (discussing such congressional and state legislative grants of amnesty); *Frisby v. United States,* 38 App. D.C. 22 (1912) (retroactive application of a law abrogating an immunity statute violated Ex Post Facto Clause). The effectiveness of these methods of obtaining testimony depends on affording witnesses "protection for crime disclosed by [them]" that is "in law, equivalent to [their] legal innocence of the crime disclosed." *Brown,* 161 U.S. at 602 (quoting *State v. Nowell,* 58 N.H. 314 (1878)). "[O]therwise, the statute[s] would be ineffectual." *Id.*

An affirmance here also might allow States to reinstate substantive crimes that they previously repealed and to prosecute those who committed the crimes before the repeals took effect. As long as the conduct was criminal when committed, under the State's position, the Ex Post Facto Clause apparently would not prevent retroactive application of the law reinstating the crime. A legislature could even combine such a law with abolition of the previously existing statute of limitations, rendering people subject to prosecution indefinitely for crimes that had been repealed after they were allegedly committed.

Lastly, allowing revival of criminal statutes of limitation would upset well-established Fifth Amendment precedent. This Court has long held that witnesses may not invoke the Fifth Amendment privilege against self-incrimination after the statute of limitations has run because there is no longer any danger of prosecution. *Hale v. Henkel,* 201 U.S. 43, 66-67 (1906); *Brown,* 161 U.S. at 598-99. This established rule would be open to serious question if statutes of limitation could be revived or eliminated long after they had expired. Witnesses could never be assured that their testimony would not be used against them in some future prosecution.

Statutes of limitation, in short, have a substantial pedigree and are deeply embedded into the fabric of American jurisprudence. This Court should resist any ruling that would not only upset the public's settled expectations regarding their operations and effect, but also that would cast other areas of law that depend on the permanent repose they provide into a state of disarray.

CONCLUSION

For the foregoing reasons, this Court should hold that § 803(g) violates the Ex Post Facto Clause as applied at least to all charged offenses occurring before 1991, including Petitioner's.

Respectfully submitted.

David M. Porter
Counsel of Record
Jeffrey L. Fisher
Barry T. Simons
Eric B. Martin
National Association of
Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, D.C. 20036
(202) 872-8600

Martin N. Buchanan
Michael B. Dashjian
1527 W. Lewis Street
San Diego, CA 92103
(619) 294-7891
Counsel for California Attorneys for Criminal Justice

January 16, 2003